

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

LINDA PEREZ and JASON PEREZ,

Plaintiffs,

v.

SPHERE DRAKE INSURANCE, LTD.,
f/k/a SPHERE DRAKE INSURANCE,
P.L.C.,

Defendant

CIVIL NO. 2001/11

TO: Lee J. Rohn, Esq.

Treston Moore, Esq. - Fax 777-5498

John Zebedee, Esq. & Karen Boback, Esq. - Fax 775-3300

ORDER DENYING PLAINTIFFS' MOTION FOR SANCTIONS

THIS MATTER came for consideration on Plaintiff's Motion for Sanctions against Defendant and its attorney, Addison J. Meyers. Defendant filed opposition to the motion (which opposition was evidently intended to include Attorney Meyers). Plaintiff filed a reply to such opposition.

Plaintiffs' motion is pursuant to Fed. R. Civ. P. 30.¹ Plaintiffs assert that during the deposition of Darlene Flobeck on May 7, 2002, "...Attorney Meyers engaged in improper instructions not to answer questions to Darlene Flobeck..." The subject deposition colloquy cited by Plaintiffs relates to

1. Plaintiff cites 7 James Wm. Moore et al., MOORES FEDERAL PRACTICE at § 30.42(2) 3d ed. 1997, "Sanctions including costs and attorney's fees may be awarded under Rule 30 for conduct that the Court determines has 'frustrated the fair examination of the deponent'."

Plaintiffs' inquiry concerning Flobeck's pre-deposition discussions with Attorney Meyers (and Attorney John Zebedee), e.g. as follows:

Q: Did they discuss with you any of the aspects of this case?

A: Yes, they did.

Q: What was the substance of what they discussed with you?

Mr. Meyers: Objection. Don't answer. I represent Ms. Flobeck, it's attorney/client privilege.

Flobeck then testified that she never paid any money to Attorney Meyers to represent her; has never signed any retainer agreement with him; that Attorney Meyers had never been her attorney before; and that Attorney Zebedee has never been her attorney. All questions concerning Flobeck's conversations with Attorneys Meyers and Zebedee were ultimately not responded to.

Plaintiffs cite Fed. R. Civ. P. 30(c) and (d) and contend that "In all proceedings, including those governed by the Federal Rules of Civil Procedure governing discovery, there is a duty imposed upon counsel to deal fairly and sincerely with the court and opposing counsel so as to conserve the time and expense of all, and that actions may be litigated in an orderly manner." *Morales v. Zondo, Inc.* 204 F.R.D. 50, 57 (S.D.N.Y 2001).

Plaintiffs assert that "...despite Plaintiffs' counsel warning that instructing Ms. Flobeck not to respond was sanctionable contact [sic], Attorney Meyers continued to

improperly instruct her not to respond ...In spite of such duty, Attorney Meyers continued to proceed improperly at the deposition. Particularly (on page 9),² where Plaintiffs' counsel informed Ms. Flobeck that since there was a non-attorney present, she was supposed to respond to the question and tell what occurred in that conversation. Again, Attorney Meyers - aware upon these facts that the substance of the conversation was not privileged - improperly and without legal basis directed the deponent not to answer..."

Plaintiffs maintain that the attorney-client privilege is waived by a voluntary disclosure of the content of a privileged communication, that the burden of establishing such privilege in **all its elements** rests upon the person asserting it and that existence of the privilege is to be determined by the courts not the party asserting the privilege. Plaintiffs argue that Attorney Meyers failed to follow correct procedures and that if he "...objected to what he regarded as forays into matters that were not to be the subject of the deposition, he could have sought a ruling from the court. He was not free simply to pepper the proceedings with interruptions and directions not to answer."

2. Reference to portions of Flobeck's deposition transcript, Ex "1" to Plaintiffs' motion.

In opposition to Plaintiffs' motion, Defendant contends that any imposition of sanctions against Defendant or its attorney must be considered in context of Fed. R. Civ. P. 30(d)(3). ...In that regard, the court must first consider whether counsel's claim of privilege in instructing the deponent not to answer was appropriate under the circumstances known to counsel at the time, even if its ultimately determined counsel's advice was erroneous."³ Defendant asserts that, "...Ms. Flobeck is a former employee of St. Croix Insurance; who at the relevant time for this case served as the managing general agent for Sphere Drake. Ms. Flobeck was a customer service representative for St. Croix Insurance. In that capacity, she sold the Sphere Drake general liability policy, which is the subject of this litigation, to Dr. Cheryl Wade." Defendant discusses Plaintiffs' theory of liability against Defendant noting that Plaintiffs have not asserted any claim against SCI, "...Instead, they have named Sphere Drake Insurance as the only Defendant and have claimed that Sphere Drake is liable for conduct of St. Croix Insurance in its dealing with Dr. Cheryl Wade..."

Defendant posits that such "...strategic decision on the

3. Defendant notes the hiatus of ten (10) months twixt Flobeck's deposition and filing this motion by Plaintiffs.

part of the Plaintiffs has not precluded Sphere Drake and St. Croix Insurance from agreeing to cooperate and present a unified joint defense to the Plaintiffs' claims. Because of the agency relationship and the common interest that existed between Sphere Drake Insurance and St. Croix Insurance, they entered into a joint defense agreement. ...The alleged misconduct raised by the Plaintiffs in this motion concerns Sphere Drake's attempt to be protected from disclosure testimony about conferences conducted by the undersigned counsel and the deponent Darlene Flobeck. These conferences were conducted as part of the joint defense between Sphere Drake Insurance and St. Croix Insurance..."

Defendant argues that the instructions given to Flobeck by Attorney Meyers were clearly within the protections provided by the joint defense privilege, the attorney-client privilege and in compliance with Fed. R. Civ. P. 30(d), and that Plaintiffs have not established any sanctionable conduct.

In their reply, Plaintiffs highlight that Ms. Flobeck was a former employee of SCI; who was not a client of Attorneys Meyer or Zebedee; that the subject communications were not made for the purpose of securing legal advice; and that attorney-client privilege is thus not applicable.

Fed. R. Civ. P. 30(d)(1) provides:

Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. **A person may instruct a deponent not to answer only when necessary to preserve a privilege**, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4) [emphasis added].

In this matter, the Court has previously determined that SCI was (at relevant times herein) the agent for Sphere Drake and that SCI's communications as agent for Sphere Drake are entitled to the same privilege protection as those of Sphere Drake. The Court has also previously found that a joint defense agreement between SCI and Defendant began on January 4, 2001 (Order on SCI's Motion for Protective Order dated December 11, 2002 at I and II).

The only issue posed by this motion is whether Attorney Meyers' instruction to Flobeck not to answer questions concerning her discussions with Attorney Meyers and Zebedee constitutes **sanctionable conduct by Attorney Meyers and Defendant**.

Accordingly, the Court need not consider whether such instruction was ultimately correct, but rather whether it was colorably so under the circumstances.

Sanctions, including costs and attorney's fees, may be awarded under Rule 30 for conduct that the court determines has 'frustrated the fair examination of the deponent' Rule 30(d)(2).

Morales v. Zondo, Inc., 204 F.R.D. 50, 53 (S.D.N.Y. 2001).

If the witness refuses to answer a question to which objection has been made, the party that put the question may move under Rule 37(a)(2) for an order compelling the answer and the sanctions of Rule 37(a)(4) may be imposed against the losing party on such a motion. The party who put the question either may adjourn the examination in order to move immediately to compel an answer or complete the examination on other matters before making the motion. There is authority for the proposition that, if an objection is made on grounds of privilege, the objecting attorney must halt the deposition for a protective order. Rigid adherence to this rule would be unduly disruptive, however, if the grounds for the privilege objection are invoked with sufficient particularity. Indeed, as detailed below, Rule 30(d)(1) explicitly authorizes an instruction not to answer to protect a privilege.

Wright, Miller & Marcus FEDERAL PRACTICE AND PROCEDURE CIVIL 2D § 2113.

Instructions to a deponent not to answer based upon an asserted privilege are best addressed by a subsequent timely motion to compel. Such procedure was followed in *e.g.*: *Plaisted v. Geisinger Medical Center et al.*, 210 F.R.D. 527, 532-33 (M.D. Pa. 2002); *In Re: Adler, Coleman Clearing Corp. v. Fiero Brothers, Inc.* 1999 WL 1747410 *7 (S.D.N.Y.); *Fondren v. Republic American Life Ins. Co. et al.*, 190 F.R.D. 597, 599 (N.D.Ok. 1999):

Fed. R. Civ. P. 30(d)(1) permits an attorney to instruct a deponent not to answer a question to preserve privilege. Republic's attorney acted properly in instructing the witness not to answer on this basis...

In Equal Employment Opportunity Comm. and Ey v. HBE Corp., 1994

WL 376273 *2 (E.D.Mo.) Ey was instructed by his attorney and the attorney for Plaintiff EEOC not to answer certain questions propounded by counsel for defendant HBE. Ey was asked about the content of a conversation he had with an EEOC attorney. The EEOC's attorney objected to the question on the basis of attorney-client privilege and instructed Ey not to answer. HBE filed a motion to compel Ey's testimony. The court found that "A client may refuse to disclose confidential communications made for purpose of facilitating or rendering professional legal services to the client by his attorney or a lawyer representing another in a matter of common interest..." and upheld the privilege in that matter.

In *Peralta v. Cendant Corporation*, 190 F.R.D. 38, 41-42 (D.C. 1999), the court considered communications by counsel with a corporation's former employee in preparation for the former employee's deposition and concluded that any pre-deposition communications relevant to the "underlying facts in the case" remained privileged. Conversations that went beyond the circumstances of Plaintiff's employment and termination and beyond the former employee's activities within the course of her employment were found not to be entitled to defendant's attorney-client privilege.

If for example, Ms. Bresnan informed Ms. Klaber of facts developed during the litigation such as testimony of other witnesses, of which Ms. Klaber would not have had prior or independent personal knowledge, such communications would not be privileged, particularly given their potential to influence a witness to conform or adjust her testimony to such information, consciously or unconsciously...

See also: *Upjohn Company et al. v. U.S.*, 101 S.Ct. 677, 680 (1981); *In re: Allen*, 106 F.3d 582, 604-5, (4th Cir. 1997); *In Re: Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, 1361 (fn. 7).

Conduct under Fed. R. 30(d) must be sufficiently egregious to warrant an imposition of sanctions. *Higginbotham v. KCS International, Inc.*, 202 F.R.D. 444, 459 (D.Md. 2001). Such conduct must clearly violate the mandates of Rule 30. *Oleson v. Kmart Corporation*, 175 F.R.D. 570, 573 (D.Kan. 1997). To warrant sanctions, interruptions at deposition by an attorney must be found to be "...beyond the scope of good faith protection of his client's interest and delayed a fair examination of the deponent." *Royal MacCabees Life Ins. Co. v. Malachinski, D.O.*, 2001 WL 290308 *12 (N.D. Ill.).

In this matter, there is no record to determine the scope of what Attorneys Meyers and Zebedee may have discussed with Ms. Flobeck in preparation for her deposition. The subject deposition was conducted on May 7, 2002 and Plaintiffs filed no

timely motion to compel Ms. Flobeck's testimony. This motion for sanctions was filed on March 4, 2003, ten (10) months after conclusion of Flobeck's deposition. Defendant has asserted that Flobeck served as managing general agent for Sphere Drake and as a customer service representative for SCI had particular connection with the insurance policy at issue herein. Clearly, some if not all of her pre-deposition discussions with Attorneys Meyers and Zebedee was privileged, but in any event such conversations were ostensibly privileged such that sanctions against Defendant or Attorney Meyers are not warranted. Further Plaintiffs' unexplained and inordinate delay in seeking sanctions militate against any entry thereof.

Accordingly, it is hereby;

ORDERED that Plaintiffs' Motion for Sanctions against Defendant and Attorney Meyers is DENIED.

ENTER:

Dated: May 27, 2003

_____/s/_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

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ATTEST:
WILFREDO MORALES
Clerk of Court

By: _____
Deputy Clerk